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SERCO INC.

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

23 TO THE CLERK OF THE COURT, ALL PARTIES AND THEIR
24 ATTORNEYS OF RECORD HEREIN:

25 PLEASE TAKE NOTICE that Defendant Serco Inc. (hereinafter "Serco"),
26 by and through its attorneys, Clyde & Co US LLP, hereby removes this pending
27 action from the Superior Court of the State of California for the County of
28 Riverside to the United States District Court for the Central District of California

1 pursuant to 28 U.S.C. Sections 1442(a)(1) and 1446, as follows.

2 INTRODUCTION

3 1. This litigation arises from an aircraft accident which occurred on
 4 February 27, 2017 near the Riverside Municipal Airport (hereinafter "RAL"). The
 5 pilot of the aircraft and three of the four passengers on board the aircraft died as a
 6 result of the incident. Serco is responsible for air traffic control operations at RAL
 7 and, at all material times, Serco controllers carried out their duties in strict
 8 compliance with comprehensive federal rules and requirements and subject to the
 9 direction, oversight and control of the Federal Aviation Administration (hereinafter
 10 "the FAA"). In addition, Serco has colorable federal defenses to plaintiffs' causes
 11 of action based on federal preemption and derivative sovereign immunity.
 12 Accordingly, and as further demonstrated below, removal of this case to this Court
 13 is proper under the Federal Officer Removal Statute, 28 U.S.C. Section 1442(a)(1).

14 BACKGROUND

15 A. *Procedural Background*

16 2. On February 15, 2018, plaintiffs filed in the Superior Court of
 17 California for the County of Los Angeles their summons and complaint, bearing
 18 Case No. BC694074 (hereinafter "the State Action"). *See* Declaration of Kevin R.
 19 Sutherland filed concurrently herewith (hereinafter "Sutherland Decl."), ¶ 3,
 20 Exhibit A.

21 3. On April 5, 2018, plaintiffs filed in the State Action their summons
 22 and first amended complaint (hereinafter "the Complaint"). *See* Sutherland Decl.,
 23 ¶ 4, Exhibit B.

24 4. On September 28, 2018, the State Action was transferred to the
 25 Superior Court of the State of California for the County of Riverside, and the case
 26 number originally assigned to the State Action was changed to RIC1822857. *See*
 27 Sutherland Decl., ¶ 5, Exhibit C.

28 5. On December 28, 2018, plaintiffs served Serco's registered agent with

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1 the summons and Complaint. *See* Sutherland Decl., ¶ 6, Exhibit D.

2 ***B. Accident Sequence and Plaintiffs' Allegations Against Serco***

3 6. The RAL control tower (hereinafter "the Tower") is an FAA
 4 nonapproach federal contract tower which is operated by Serco pursuant to a
 5 contract with the FAA (hereinafter "the Contract"). *See* Declaration of David J.
 6 McCann filed concurrently herewith (hereinafter "McCann Decl."), ¶ 5, Exhibit A.

7 7. Prior to the accident on the date of the incident, former Serco air
 8 traffic controller, Darrell Bloomer (hereinafter "Bloomer"), provided the pilot of
 9 the accident aircraft, Nouri Hijazi (hereinafter "the Pilot"), with taxi instructions
 10 and, once the aircraft reached the runway, Bloomer cleared the aircraft to takeoff
 11 from RAL. *See* Complaint, at ¶¶ 24-27. The Complaint alleges that Bloomer
 12 repeated his taxi instructions and departure clearance multiple times before the
 13 pilot repeated the instructions and clearance correctly. *See* Complaint, at ¶¶ 25-27.

14 8. While the Complaint does not identify a duty which Bloomer and/or
 15 Serco breached during the incident, it appears that plaintiffs are alleging that Serco
 16 is liable for the accident because Bloomer cleared the Pilot to take off despite the
 17 Pilot being allegedly "confused and disorientated." *See* Complaint, at ¶¶ 25, 27.

18 ***C. Consent and Timing of Removal***

19 9. Pursuant to 28 U.S.C. Section 1446(b), the deadline to remove a state
 20 court action to federal court is within thirty days after the receipt by the defendant
 21 of a complaint that provides a basis to remove or, if the complaint does not provide
 22 such a basis, thirty days from receiving a pleading or paper that does so provide.

23 10. The Complaint provided Serco with a basis to remove the State
 24 Action to this Court. January 27, 2019 is thirty days after the date Serco was
 25 served with the summons and Complaint. Since this Notice of Removal was filed
 26 prior to January 27, 2019, this removal is timely under 28 U.S.C. Section 1446(b).

27 11. The Federal Officer Removal Statute, 28 U.S.C. Section 1442(a)(1),
 28 authorizes a defendant to remove a state action to federal court without obtaining

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1 the consent of any other defendant named in the litigation. *See Durham v.*
 2 *Lockheed Martin Corp.*, 445 F.3d 1247, 1253 (9th Cir. 2006). Accordingly, no
 3 other party is required to consent to this removal.

4 **ARGUMENT**

5 **I**

6 **THIS ACTION IS PROPERLY REMOVED TO THIS COURT**
 7 **PURSUANT TO THE FEDERAL OFFICER REMOVAL STATUTE**

8 12. The Federal Officer Removal Statute authorizes removal of a civil
 9 action brought against any person "acting under" an officer of the United States
 10 "for or relating to any act under color of such office." 28 U.S.C. § 1442(a)(1).
 11 Unlike removal under Section 1441, Section 1442(a)(1) is "liberally construed" in
 12 favor of removal. *Durham*, 445 F.3d at 1252. Therefore, the strong policy
 13 favoring removal under Section 1442(a)(1) "should not be frustrated by a narrow,
 14 grudging interpretation." *Arizona v. Manypenny*, 451 U.S. 232, 242 (1981).

15 13. The right to remove under Section 1442(a)(1) is "absolute" provided
 16 the following elements are satisfied: (1) the removing defendant is a "person"
 17 within meaning of the statute; (2) the defendant "acted under" an officer of the
 18 United States; and (3) the defendant has at least one "colorable" defense to the
 19 plaintiff's claims. *See, e.g., Mesa v. California*, 489 U.S. 121, 124-25 (1989).

20 14. As demonstrated below, each of these elements are satisfied. As such,
 21 removal of the State Action to this Court is proper pursuant to Section 1442(a)(1).

22 **A. *Serco is a "Person" Within the Meaning of Section 1442(a)(1)***

23 15. A private corporation is a "person" entitled to invoke the Federal
 24 Officer Removal Statute. *See, e.g., Yocum v. CBS Corp.*, No. 17-cv-01061-SJO,
 25 2017 WL 8231363, at *4 (C.D. Cal. May 1, 2017). Accordingly, because Serco is
 26 a private corporation, it is a "person" within the meaning of Section 1442(a)(1).

27 **B. *Serco "Acted Under" the Direction of a Federal Officer***

28 16. For a private entity to be "acting under" a federal officer, it must be

1 involved in "an effort to assist, or to help carry out, the duties of the federal
 2 superior." *Watson v. Philip Morris Companies, Inc.*, 551 U.S. 142, 143 (2007). A
 3 critical inquiry in this analysis is whether the defendant "performed a job that, in
 4 the absence of a contract with a private firm, the Government would have had to
 5 perform." *Watson*, 551 U.S. at 154.

6 17. A defendant must also show that its conduct taken under federal
 7 direction was "causally connected" to the plaintiff's claims. *See, e.g., Goncalves v.*
 8 *Rady Children's Hosp. San Diego*, 865 F.3d 1237, 1244–45 (9th Cir. 2017). The
 9 Ninth Circuit has held that "the hurdle erected by the causal-connection
 10 requirement is quite low." *Goncalves*, 865 F.3d at 1244. Further, to satisfy this
 11 requirement, defendants "need show only that the challenged acts occurred because
 12 of what they were asked to do by the Government." *Goncalves*, 865 F.3d at 1245.
 13 In assessing whether a causal nexus exists, courts must credit the defendant's
 14 theory of the case. *See Leite v. Crane Co.*, 749 F.3d 1117, 1124 (9th Cir. 2014).

15 18. For instance, in *Badilla v. Nat'l Air Cargo, Inc.*, plaintiffs commenced
 16 an action in state court arising from the crash of an aircraft near the Kabul
 17 Afghanistan International Airport (hereinafter "KAIA"). No. 12-cv-1066 (MOD),
 18 2014 WL 6390324 (W.D.N.Y. Nov. 17, 2014). Plaintiffs brought suit against,
 19 *inter alia*, a private entity (hereinafter "Midwest") that provided air traffic control
 20 services at KAIA pursuant to a contract with a prime contractor, which had
 21 contracted with the United States military. *Badilla*, 2014 WL 6390324, at *1.
 22 Defendants removed the case to federal court based, in part, on Section 1442(a)(1),
 23 and plaintiffs then filed a motion to remand. *Badilla*, 2014 WL 6390324, at *1.

24 19. The Court observed that a United States military officer regularly
 25 supervised Midwest controllers, who were trained by the military, and that military
 26 personnel drafted a document describing the controllers' tasks and responsibilities.
 27 *Badilla*, 2014 WL 6390324, at *3-4. The court held that Midwest had satisfied the
 28 first element of the Section 1442(a) standard because Midwest's "control tower

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1 services assisted the United States in achieving its objectives" and the plaintiffs' 2 claims were sufficiently related to those services. *Badilla*, 2014 WL 6390324, at 3 *7; *see also Bennett v. MIS Corp.*, 607 F.3d 1076, 1083 (6th Cir. 2010) (holding 4 that Section 1442(a)(1) was satisfied because an FAA mold remediation contractor 5 "helped FAA officers carry out their task of ridding a federal employee occupied 6 building of an allegedly hazardous contaminant – a job that, in the absence of a 7 federal contract with the contractor, the FAA itself would have had to perform").

8 20. Here, the FAA exercises significant oversight and control over Serco's 9 air traffic control operations at RAL. For instance, the Contract requires Serco to 10 implement facility training and quality assurance programs at the Tower, which 11 must be in strict compliance with all FAA requirements and are subject to 12 evaluation by the FAA. *See McCann Decl.*, ¶¶ 5-7, Exhibit A, pp. C-3-C-4. Serco 13 air traffic controllers must be trained pursuant to FAA requirements, and Serco is 14 required to maintain certain FAA-mandated training records for review by the 15 FAA. *See McCann Decl.*, ¶¶ 5, 6, Exhibit A, pp. C-3-C-4.

16 21. The Contract further provides that Serco must submit to the FAA 17 monthly, quarterly and annual reports pertaining to its adherence to FAA rules. 18 *See McCann Decl.*, ¶¶ 5, 7, Exhibit A, p. C-5-C-6. The Contract provides the FAA 19 the right to approve changes to Serco's internal operating documents. *See McCann* 20 *Decl.*, ¶¶ 5, 8, Exhibit A, p. C-10. The Contract also authorizes the FAA to 21 conduct inspections and audits of Serco's operations. *See McCann Decl.*, ¶¶ 5, 8, 22 Exhibit A, p. C-11, E-1.

23 22. The Contract states that Serco must comply with all FAA orders 24 identified in the Contract. *See McCann Decl.*, ¶¶ 5, 9 Exhibit A, at p. C-1, Part III, 25 Section J. For instance, Serco must comply with extensive and detailed 26 administrative and operational requirements included in the FAA's Facility 27 Operations and Administration Order (FAA JO 7210.3Z). *See McCann Decl.*, ¶ 28 10, Exhibit B. In addition, under the FAA's Air Traffic Organization Quality

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1 Control Order (FAA JO 7210.634), Serco must regularly conduct internal reviews
 2 and annual compliance verifications, which must be provided to the FAA. *See*
 3 McCann Decl., ¶ 11, Exhibit C, at pp. 8-17; ¶ 12, Exhibit D. Pursuant to the FAA's
 4 Air Traffic Organization Audit and Assessment Program Order (FAA JO 7010.14),
 5 the FAA is entitled to conduct audits of Serco's operations, with or without prior
 6 notice. *See* McCann Decl., ¶ 13, Exhibit E, at p. 2. Serco controllers are required
 7 to comply with the comprehensive rules and requirements included in the ATC
 8 Manual when carrying out their duties. *See* McCann Decl., ¶ 14, Exhibit F.

9 23. The direction, control and oversight exercised by the FAA over
 10 Serco's air traffic control operations is much more significant and extensive than
 11 that which the military exercised over Midwest in *Badilla*. *See* 2014 WL 6390324,
 12 at *3-7. In addition, by operating the Tower, Serco is assisting and helping to
 13 carry out the duties and tasks of the FAA. *See* *Watson*, 551 U.S. at 143. Further,
 14 just as in *Bennett*, if the FAA elected not to enter into a contract with a private
 15 entity to operate the Tower, it would be required to operate the Tower itself. 607
 16 F.3d at 1083; *see also* *Watson*, 551 U.S. at 152. Thus, it cannot be reasonably
 17 disputed that Serco was "acting under" the FAA within the meaning of Section
 18 1442(a)(1).

19 24. As noted above, plaintiffs appear to allege that it was negligent for
 20 Bloomer to issue a takeoff clearance when the Pilot was allegedly confused and
 21 disoriented. *See* Complaint, at ¶¶ 25, 27. However, as discussed below, Bloomer
 22 complied with all ATC Manual requirements when clearing the Pilot to takeoff.
 23 *See* McCann Decl., ¶ 13. Bloomer was required to follow the ATC Manual
 24 requirements under federal law. *See* 14 C.F.R. § 65.45. Thus, there is a causal
 25 nexus between plaintiffs' claims and acts Bloomer took pursuant to federal law.

26 ***C. Serco Has Colorable Federal Defenses to Plaintiffs' Claims***

27 25. For a federal defense to be deemed colorable under Section
 28 1442(a)(1), it is not necessary for the defense to be meritorious. *See* *Leite*, 749

1 F.3d at 1123. Instead, a defendant must show "merely that there is a legitimate
 2 question of federal law to be decided regarding the validity of the defense."
 3 *Yocum*, 2017 WL 8231363, at *4. When considering whether a defense is
 4 colorable, courts must view the facts in a light most favorable to the defendant.
 5 *See, e.g., Leite v. Crane Co.*, 868 F. Supp. 2d 1023, 1038 (D. Haw. 2012).

6 ***i. Serco Has a Colorable Derivative Sovereign Immunity Defense***

7 26. In *Yearsley v. W.A. Ross Constr. Co.*, the Supreme Court held that a
 8 government contractor is immune from liability if: (1) the government "authorized"
 9 the contractor's actions; and (2) the government "validly conferred" that
 10 authorization, meaning it acted within its constitutional power. 309 U.S. 18, 20-
 11 21. Conversely, derivative sovereign immunity may not be invoked "[w]hen a
 12 contractor violates both federal law and the Government's explicit instructions."
 13 *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 666 (2016). The Ninth Circuit has
 14 held that derivative sovereign immunity under *Yearsley* is limited to cases in which
 15 contractors had no discretion to deviate from federal requirements and completely
 16 followed government specifications. *See Cabalce v. Thomas E. Blanchard &*
 17 *Assocs., Inc.*, 797 F.3d 720, 732 (9th Cir. 2015).

18 27. Here, with respect to the first element, Serco was authorized to
 19 operate the Tower pursuant to the Contract. *See McCann Decl.*, ¶ 5. In addition,
 20 during the incident, Bloomer was required under the ATC Manual to issue a
 21 takeoff clearance to the Pilot. *See McCann Decl.*, ¶ 16. The ATC Manual states
 22 that air traffic controllers must ensure there is adequate spacing between aircraft on
 23 runways. *See McCann Decl.*, ¶ 14, Exhibit F, Sections 3-8-1, 3-9-6. When
 24 deciding whether to issue a takeoff clearance, Bloomer was only required to focus
 25 on known traffic and physical airport conditions. *See McCann Decl.*, ¶¶ 14,
 26 Exhibit F, Glossary.

27 28. Under Section 3-9-5 of the ATC Manual, controllers are not required
 28 to withhold a takeoff clearance when there is reasonable assurance that prescribed

1 separation exists between the subject aircraft and other aircraft and/or objects
 2 located on a runway. *See* McCann Decl., ¶¶ 14, Exhibit F, Section 3-9-5. When
 3 Bloomer issued the takeoff clearance, there were no other aircraft or objects
 4 located on the runway, aside from the accident aircraft. *See* McCann Decl., ¶ 16.
 5 Thus, his decision to issue a takeoff clearance complied applicable ATC Manual
 6 provisions, which he was required to follow under federal law. *See* 14 C.F.R. §
 7 65.45. Therefore, the FAA authorized Bloomer's to issue the takeoff clearance.

8 29. As noted above, plaintiffs argue that it was negligent for Bloomer to
 9 issue the takeoff clearance when the Pilot was confused and disoriented. *See*
 10 Complaint, at ¶¶ 25, 27. However, Bloomer was not required, authorized, or
 11 otherwise given the discretion under the ATC Manual to withhold the takeoff
 12 clearance based on his subjective determination regarding the Pilot's competence
 13 and/or physical or mental condition. *See* McCann Decl., ¶ 16. Further, Bloomer
 14 was not qualified to make this determination, as he is not a physician and could not
 15 observe the Pilot. *See* McCann Decl., ¶ 16. Accordingly, Bloomer was not
 16 negligent during the incident and he did not have the discretion to deviate from the
 17 ATC Manual requirements.

18 30. As to the second element, Congress has authorized the FAA to enter
 19 into contracts with private companies to operate federal contract towers pursuant to
 20 the federal contract tower program (hereinafter "the Program"). *See* 49 U.S.C. §
 21 47124. The Contract was entered into between Serco and the FAA pursuant to the
 22 Program. *See* McCann Decl., ¶ 5. As such, the FAA "validly conferred" the
 23 authorization described above pursuant to federal law. *See* 49 U.S.C. § 47124.
 24 Accordingly, Serco has a colorable federal derivative sovereign immunity defense.

25 ***ii. Serco Has A Colorable Federal Preemption Defense***

26 31. Congress has the power to preempt state law, which it may do either
 27 expressly or impliedly. *See* *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516
 28 (1992). There are two types of implied preemption: conflict preemption and field

1 preemption. *Cipollone*, 505 U.S. at 516. Courts may find conflict preemption
 2 when a state law actually conflicts with federal law or when it stands as an obstacle
 3 to the objectives of Congress in enacting the federal law. *See Cipollone*, 505 U.S.
 4 at 545. Implied preemption exists when federal law so thoroughly occupies a
 5 legislative field "as to make reasonable the inference that Congress left no room
 6 for the States to supplement it." *Cipollone*, 505 U.S. at 516.

7 32. In *Montalvo v. Spirit Airlines*, the Ninth Circuit held that pervasive
 8 "regulations enacted by the [FAA], read in conjunction with the [Federal Aviation
 9 Act], sufficiently demonstrate an intent to occupy exclusively the entire field of
 10 aviation safety." 508 F.3d 464, 471 (9th Cir. 2007); *see also* 49 U.S.C. § 40103, *et*
 11 *seq.* The court further held that preemption of state law claims pertaining to
 12 aviation safety was warranted to ensure that there existed "a single, uniform system
 13 for regulating aviation safety" and to prevent a "crazyquilt" patchwork of varying
 14 obligations. *Montalvo*, 508 F.3d at 471; *accord Abdullah v. American Airlines,*
 15 *Inc.*, 181 F.3d 363, 367 (3d Cir. 1999); *see also Martin ex rel. Heckman v. Midwest*
 16 *Exp. Holdings, Inc.*, 555 F.3d 806, 811 (9th Cir. 2009) (holding that state laws
 17 implicating the field of aviation safety are preempted to the extent that the FAA
 18 and/or Congress has issued "pervasive" federal regulations or requirements).

19 33. As noted above, the 868-page ATC Manual includes comprehensive
 20 requirements that air traffic controllers must follow under federal law. *See* 14
 21 C.F.R. § 65.45. In addition, under federal law, "[t]he United States Government
 22 has exclusive sovereignty of airspace of the United States", and the FAA has the
 23 exclusive right to prescribe air traffic regulations and requirements "to ensure the
 24 safety of aircraft and the efficient use of airspace." *See* 49 U.S.C. § 40103(a), (b).

25 34. Given the pervasive nature of the federal requirements included in the
 26 ATC Manual and because these rules directly concern aviation safety, plaintiffs'
 27 common law claims against Serco are subject to field preemption. *See Montalvo*,
 28 508 F.3d at 471. To permit state law standards of care to be imposed on air traffic

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1 controllers would inevitably lead to a "crazyquilt" of inconsistent regulations,
2 which would defeat the interest of Congress in ensuring uniformity in the
3 regulation of air safety. *See Montalvo*, 508 F.3d at 471; *see also* 49 U.S.C. §
4 40103(a), (b). Subjecting controllers to inconsistent state and federal standards
5 would undoubtedly lead to confusion regarding the standard of care and the rules
6 and requirements applicable to air traffic controllers. In a field where quick
7 decision-making is essential and second-guessing can lead to accidents, a uniform
8 standard is necessary to ensure the safety of the airspace in the United States.

9 35. In addition, because the common law duty plaintiffs seek to impose on
10 Serco and Bloomer is inconsistent with the requirements included in the ATC
11 Manual, plaintiffs common law claims against Serco are subject to conflict
12 preemption. Accordingly, Serco has a colorable federal preemption defense.

CONCLUSION

14 In light of the foregoing, because each of the elements under the Section
15 1442(a)(1) standard are satisfied, this Court has original jurisdiction over this
16 action pursuant to 28 U.S.C. Sections 1442(a)(1) and 1446.

17 WHEREFORE, Serco prays that the above-entitled action now pending in
18 the Superior Court of California for the County of Riverside be removed to this
19 Court pursuant to 28 U.S.C. Sections 1442(a)(1) and 1446.

DATED: January 24, 2019

CLYDE & CO US LLP

By:

KEVIN R. SUTHERLAND
CHRISTIAN T. JOHNSON
Attorneys for Defendant
SERCO INC.

PROOF OF SERVICE

I am a employed in the County of San Francisco, State of California, I am over the age of eighteen years, and not a party to the within action. My business address is 101 Second Street, 24th Floor, San Francisco, California 94105.

On January 24, 2019, I served the document(s) described as:

**NOTICE OF REMOVAL OF SERCO INC.
TO UNITED STATES DISTRICT COURT**

on the parties in this action addressed as follows:

SEE ATTACHED SERVICE LIST

- (BY FAX):** by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below, or as stated on the attached service list, on this date before 5:00 p.m.
- (BY MAIL):** as follows: I am “readily familiar” with the firm’s practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at San Francisco, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in affidavit.
- (BY OVERNIGHT DELIVERY):** I caused such envelope(s) to be delivered to an overnight delivery carrier with delivery fees provided for, addressed to the person(s) on whom it is to be served.
- (BY PERSONAL SERVICE):** I caused such envelope(s) to be delivered by hand this date to the offices of the addressee(s).
- (BY CM/ECF):** by electronic filing system with the clerk of the Court which will send a Notice of Electronic Filing to all parties with an e-mail address of record, who have filed a Notice of Consent to Electronic Service in this action:

I declare under penalty of perjury according to the laws of the State of California that the foregoing is true and correct.

Executed on January 24, 2019, at San Francisco, California.

Sonja L. Gray

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16 Estate of Nouri D. Hijazi and Richard Pierce
17 as Trustee of The Hajazi Living Trust

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